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Review of Selective Service Reclassifications

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In the fall of 1965 a group of University of Michigan students staged a sit-in at the Ann Arbor draft board to protest the Vietnam War. When the Selective Service director in New York City heard about the affair, he urged local draft boards within his area to cancel student deferments of any of the participants who were registered there. Two Michigan undergraduates, one from Manhattan and the other from Queens, soon were notified that they had been reclassified I-A and were "delinquent" because the sit-in violated the Selective Service Act.[1] The students promptly brought suit against the regional Selective Service director, seeking a restoration of their deferments, but the district court dismissed the suit for want of a justiciable controversy. The court of appeals reversed in *Wolff v. Selective Service Local Board No. 16*,[2] finding that the draft boards had exceeded their jurisdiction; while the students could have been indicted for their protest activities in Michigan, nothing in the Selective Service Act empowered draft boards to withdraw deferments as punishment for such violations.

In order to reach the merits of the case, however, the court faced a formidable barrier that had deterred the district judge at the threshold. The Government argued that no reclassification, however questionable, could be reviewed prior to a registrant's appearance for induction into the service. To meet this argument the court of appeals fashioned important new law. Not every withdrawal of a deferment,

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1. 50 U.S.C. APP. § 451 *et seq.* (1964), *as amended*, (Supp. III, 1965-67).
2. 372 F.2d 817 (2d Cir. 1967).

the court acknowledged, would warrant judicial intervention at this stage. Where reclassification merely causes the registrant worry and inconvenience, he must bide his time and take his chances; no justiciable controversy will arise until an induction order has been received and he has responded to it. In *Wolff*, however, "[t]he effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights . . . ."[3] Moreover, this threat to constitutionally protected interests was magnified by

> the uncertainty as to the standard which the Service has applied. As there is no statute or regulation to guide the local boards, the registrant cannot know whether sit-ins alone will be deemed a basis for reclassification or whether sidewalk demonstrations or even more remote conduct are to be included.[4]

Under these special circumstances, then, the reclassification by itself created a justiciable controversy.

The court of appeals then went one step further. Not only should the district court entertain the suit under such conditions, but the plaintiffs also were not barred by their neglect of the channels of appeal available within the Selective Service System.[5] Exhaustion of these remedies was held unnecessary, partly because of the overriding first amendment interest that demanded early vindication and partly because the national appeal board and the national Selective Service director had already rejected almost identical claims for the reinstatement of deferments in other cases.[6]

By the fall of 1967, just as *Wolff* was being widely cited as the basis for other suits to enjoin reclassifications, two developments significantly undercut its impact. First, Congress amended the statute so as to deprive district courts of the power asserted in *Wolff*; section 10(b)(3) of the new law provided that "no judicial review shall be made of the classification or processing of any registrant by local boards . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."[7] Second, Selective Service Director Lewis B. Hershey sent to all local boards a directive recommending prompt reclassification of registrants who took part in anti-draft protests and other violations of the Selective Service law.[8] Such activities, he

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3. *Id.* at 823.
4. *Id.* at 824.
5. For description of the appeal procedure, see Comment, *The Selective Service*, 76 YALE L.J. 160, 170-72 (1966).
6. In fact, by the time the *Wolff* case had reached the court of appeals, the national appeal board had unanimously ruled against claims for restoration of deferments by other students who had been reclassified following the Ann Arbor draft board sit-in. Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817, 825 (2d Cir. 1967).
7. 50 U.S.C. APP. § 460(b)(3) (Supp. III, 1965-67), *amending* 50 U.S.C. APP. § 460(b)(3) (1964).
8. Letter from Lt. Gen. Lewis B. Hershey to All Members of the Selective

later explained, would include not only destruction of draft cards or draft board sit-ins, but demonstrations against military recruiters on college campuses as well. He argued that such demonstrations violated the law "by inference" if not directly, since they made it more difficult for other registrants to volunteer for military service.[9]

The net effect of these two developments was to accelerate the punitive use of reclassification and, at the same time, to insulate such action by draft boards until induction notices were received. The result was predictable. Some reclassification suits filed after *Wolff* were awaiting decision in the district courts; here, clearly, the validity of the new section 10(b)(3) would be tested. Other suits were generated by local implementations of General Hershey's directive. Within a few weeks, injunctions were sought on behalf of two clergymen reclassified from IV-D to I-A because they turned in their draft cards; a twenty-nine year old professor with three children who lost his III-A deferment for the same reason; and a University of Oklahoma student whose deferment was withdrawn because his draft board did not feel his "activity as a member of Students for a Democratic Society [was] to the best interests of the U.S. Government."[10] Moreover, before the end of the year the National Student Association —on behalf of several other student organizations and individual registrants—filed a suit attacking the constitutionality of General Hershey's memo and the practice of withdrawing deferments as punishment for protest activity.[11]

Soon after the effective date of the new Selective Service amendments, the courts were filled with such cases. In each case the threshold question of jurisdiction had to be faced—a question involving both the construction and the constitutionality of the new judicial review section. The first courts to rule on the matter held that Congress had meant to foreclose any review of a classification prior to the induction stage and had the constitutional power to postpone that appeal.[12] A district judge in Georgia conceded this conclusion left the

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Service System, Oct. 26, 1967, & Local Board Memorandum No. 85, Oct. 24, 1967, in N.Y. Times, Nov. 9, 1967, at 2, cols. 3-5.

9. N.Y. Times, Nov. 9, 1967, at 2, cols. 3-5.

10. The cases are summarized in *Academe* (Newsletter of the American Association of University Professors), Jan. 1968, at 4. There were other cases worthy of note during that period. A Protestant chaplain at Cornell University, for example, was reclassified I-A after turning in his draft card to protest the war. N.Y. Times, Apr. 16, 1968, at 41, cols. 1-5. A 37-year-old history professor at the University of Maryland was, for similar acts of protest, ordered by his draft board to do janitorial work in lieu of military service. N.Y. Times, Jan. 18, 1968, at 12, col. 3. The National Selective Service administration promptly reversed that order, however. N.Y. Times, Jan. 19, 1968, at 11, col. 1. Meanwhile, several other suits were brought to challenge the Hershey directive and to seek restoration of deferments and exemptions withdrawn for protest activities. *See, e.g.*, N.Y. Times, Jan. 26, 1968, at 3, cols. 3-4. For further information about the Oklahoma student reclassified because of draft board hostility to his SDS leadership, see N.Y. Times, Jan. 19, 1968, at 11, col. 1.

11. National Student Ass'n v. Hershey, Civil No. 3078-67 (D.D.C. Mar. 8, 1968), *summarized in* 1 SSLR 3026 (1968), *and* Brief for Respondents at 81-82, Oestereich v. Selective Service Local Bd. No. 11, No. 46 (U.S. 1968).

12. *E.g.*, Moskowitz v. Kindt, 273 F. Supp. 646 (E.D. Pa. 1967), *aff'd*, 394 F.2d 648 (3d Cir. 1968); Zigmond v. Selective Service Local Bd. No. 16, 284

registrant a "Hobson's choice," but insisted that was the quandary Congress had meant to place him in.[13] The district courts were not in complete accord, however. One case was decided in the registrant's favor, despite the new statute, because a district judge in New York saw "irreparable harm if his immediate induction is not enjoined."[14] Meanwhile, a district court in San Francisco could find no escape from the preclusive effect of the new provision, but held it to be a denial of due process.[15] The court deemed it "unconstitutional to restrict a registrant to the criminal trial forum to raise the defense that his order to report for induction was invalid because of procedural errors committed by the agency in the classification process."[16] Under this view, not even the special first amendment interests present in *Wolff* apparently need be shown in order to reverse a reclassification; "procedural errors" alone would suffice.[17]

One other case should be mentioned, because it is the vehicle by which the question has reached the Supreme Court. A divinity school student named Oestereich—who was entitled to and held the same IV-D classification that ministers enjoy[18]—turned his draft card in to the Department of Justice in October 1967.[19] Two weeks later his Wyoming draft board sent him a I-A delinquency notice for failure to have a registration certificate in his possession. The student appealed unsuccessfully through the Selective Service System and then filed suit in the district court seeking reinstatement of his exempt status. The district court dismissed the action, and the court of appeals affirmed,[20] both courts relying on the judicial review provision of the new law.

The student's petition for certiorari brought a curiously ambivalent response from the Solicitor General. The Government's memorandum to the Court suggested that special circumstances might warrant ju-

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F. Supp. 732 (D. Mass.), *aff'd*, 396 F.2d 290 (1st Cir. 1968); Breen v. Selective Service Local Bd. No. 16, 284 F. Supp. 749 (D. Conn. 1968).

13. Carpenter v. Hendrix, 277 F. Supp. 660, 662 (N.D. Ga. 1967).

14. Kimball v. Selective Service Local Bd. No. 15, 283 F. Supp. 606, 608 (S.D.N.Y. 1968). The court stressed the fact that this suit was a class action, which may have contributed materially to the perception of injury that would result unless an injunction issued.

15. Petersen v. Clark, 285 F. Supp. 700 (N.D. Cal. 1968). *See also* Faulkner v. Clifford, 289 F. Supp. 895 (E.D.N.Y. 1968).

16. 285 F. Supp. at 712.

17. Because of its broad approach to the constitutional issue, the court had little occasion to consider the plaintiff's particular objections to his reclassification. It did not appear, however, that there was any substantive (*e.g.*, first amendment) issue at stake approaching the gravity of those involved in most of the other cases, where the courts uniformly refused to enjoin reclassification under the amended statute.

18. *See* 50 U.S.C. APP. § 456(g) (1964).

19. Oestereich v. Selective Service Local Bd. No. 11, 280 F. Supp. 78 (D. Wyo.), *aff'd per curiam*, 390 F.2d 100 (10th Cir.), *cert. granted*, 88 S. Ct. 1804 (1968) (No. 1246, 1967 Term; renumbered No. 46, 1968 Term).

20. 390 F.2d 100 (10th Cir. 1968).

dicial intervention in this case because the exemption for ministers and divinity students was grounded in the clear terms of the statute. But the Solicitor General also urged the Court to hold the judicial review provision constitutional as applied to the general run of reclassification cases. The Supreme Court agreed to review the case.

The Meaning of the Statute

Enough has been said to frame the two questions that must now be answered: First, how far has Congress in fact gone in limiting the power of district courts to review reclassifications before induction? Second, what constitutional issues does the statute raise if it is broadly construed? The first question requires more than passing attention, because the 1967 amendment is less precise than a superficial reading of its words might suggest. Accordingly, we begin the inquiry with an attempt to divine its meaning.

Some understanding of the background of judicial review of reclassifications is essential. There has been a recurrent tension between the registrant's quest for a court test of a classification he feels erroneous or unjust and the interest of the Selective Service System in avoiding litigation that may impede or complicate the recruiting of needed manpower. The tension has been resolved by an uncertain accommodation. The first of the World War II cases, *Falbo v. United States*,[21] assumed that a registrant must have some chance to question his classification, but the Court found neither statutory nor constitutional basis for review prior to appearance for induction (or in the case of a conscientious objector such as Falbo himself, presentation for assignment to civilian work in lieu of service). Thus Falbo's attempt to review the classification in a prosecution for failure to report for assignment to civilian work was premature. Over the dissent of Mr. Justice Murphy, the Court deferred to a congressional judgment that the exigencies of war required a degree of speed that would not allow registrants to challenge their classifications before the final stage of acceptance or induction.

Two years later the apparent harshness of *Falbo* was tempered somewhat by *Estep v. United States*,[22] decided after the end of hostilities. The governing statute made decisions of local draft boards "final."[23] However, the Court found in this term no design to foreclose all judicial review of classifications, but simply to narrow the scope of review. Only when there was "no basis in fact" for the board's action could a court set it aside;[24] merely erroneous decisions

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21. 320 U.S. 549 (1944).
22. 327 U.S. 114 (1946).
23. Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 885.
24. The Court thus gave deference to the congressional use of the term "final" by narrowing the scope of review:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified.

or orders contrary to the weight of the evidence, which might be reversible under general principles governing review of agency action, were immune in the Selective Service context. This recognition of the availability of limited judicial review, albeit at the late stage to which it was relegated by *Falbo*, mooted the difficult constitutional issue that would have emerged if the Court had defined the statutory term "final" as "unreviewable at any time."

Neither of these cases, to be sure, involved the question that is now before us—whether a court may order a draft board to restore a deferment or exemption it has taken away or may enjoin a threatened induction. That issue was soon to arise in pure form. At least four federal courts did consider the question of jurisdiction of suits against draft boards between *Estep* and *Wolff*. The Courts of Appeals for the Sixth and Tenth Circuits divided on the question,[25] though neither considered the issue at any length. In addition, two district courts assumed they had the power to stay draft board proceedings prior to induction if a sufficient case were made on the merits to upset the classification.[26] But only once during these two decades did the question receive serious consideration in the courts. Judge Jerome Frank, dissenting from the Second Circuit's refusal to reach the merits of a registrant's suit to enjoin his induction,[27] cautioned against complete judicial abdication. If the local board's action demonstrated a complete lack of jurisdiction—if, for example, the plaintiff were "a member of Congress or . . . a naval officer on active duty"—Judge Frank "gravely doubted" that such a registrant must wait to challenge the validity of a classification until he was called for induction.

It is understandable that this question has until recently had rather limited practical importance. The rapid rise in anti-Vietnam War sentiment, particularly among those age groups most vulnerable to

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The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

327 U.S. at 122-23.

25. *Compare* Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (Stewart, J.) *with* Warren v. Abernathy, 198 F.2d 622 (10th Cir. 1952). The court of appeals in *Townsend* simply assumed that the registrant was entitled to have his induction enjoined while he was pursuing an administrative appeal —a factor which may make this case somewhat more appealing for the plaintiff than the ordinary suit of this type.

26. *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952); Tomlinson v. Hershey, 95 F. Supp. 72 (E.D. Pa. 1949). (The two cases were decided by different judges of the same court.) *Fabiani* was a most unusual case. The registrant received an induction notice while studying at a medical school abroad, followed shortly by a letter from the United States Attorney threatening indictment if the registrant did not return promptly. He then filed a petition for habeas corpus, which was granted—even though he had not yet been inducted—on the ground that the petitioner was already in "constructive custody of the Government" after the threat of indictment. 105 F. Supp. at 148.

27. Schwartz v. Strauss, 206 F.2d 767 (2d Cir. 1953) (concurring opinion).

the draft, together with the new Selective Service policy of regulating demonstration and protest through reclassification, have spurred the quest for avenues of challenge outside the Selective Service System. The sharp rise in convictions for refusing induction—a 76 per cent increase from 1966 to 1967—reflects this tension between registrant and Selective Service.[28] Moreover, the favorable decision in *Wolff* undoubtedly encouraged the filing of injunction suits. Thus a convergence of pressures has given this jurisdictional question a practical significance not possible during the quiet years between the end of World War II and the Vietnam escalation.

The relative novelty of *Wolff* suggests that Congress dealt with the question of judicial review more out of anxiety about the future than dissatisfaction with the past. There was no reference in the legislative history to the extent of pending or anticipated litigation against Selective Service decisions, and there was apparently little awareness of the development of the issue since *Falbo*. Moreover, there were important differences of tone, if not of substance, between the House and Senate committee reports, neither of which devoted more than one or two paragraphs to the matter. The Senate committee report contained an obvious reference to *Wolff*:

> Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.[29]

In the view of the House committee, the language in the new bill

> reenunciated the principle already in existing law that the courts cannot review the classification action of the Selective Service System until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively.
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> The Committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after the registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order.[30]

The inconclusive character of these statements invites diverse interpretations of congressional intent. It seems appropriate to canvass the possibilities before reaching the constitutional question, for the constitutional issue is presented only if the statute postpones all judicial review to the induction stage. Although one district judge has found an implied exception to section 10(b)(3) which would forestall the constitutional issue,[31] most courts have found the constitutional

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Judge Frank eventually concurred with the court's dismissal of the suit, because he found no basis for intervention after reaching the merits.

28. *See* N.Y. Times, Mar. 3, 1968, at 76, cols. 3-6.
29. S. Rep. No. 209, 90th Cong., 1st Sess. 10 (1967).
30. H.R. Rep. No. 267, 90th Cong., 1st Sess. 30-31 (1967).
31. Kimball v. Selective Service Local Bd. No. 15, 283 F. Supp. 606 (S.D. N.Y. 1968).

question unavoidably posed by the statute's comprehensive language.

(1) One possible reading must be mentioned for the sake of symmetry, but can be readily dismissed. The language of the statute by itself might be deemed to affect the *scope* rather than the *timing* of judicial review—that is, to change the "no basis in fact" test formulated in *Estep* and refined in later cases.[32] There was, however, no mention of the question of scope of review anywhere in the legislative history, and no recent cases have dealt with the issue in a way that might have aroused congressional concern. Although the prior statutes said nothing about the scope of review, it seems quite clear that the 1967 amendment, by incorporating the "no basis in fact" language from the earlier cases, meant to codify the line of decisions reaching back to *Estep*. The one district court to consider the issue since enactment of the new law has so held: "The language of the statute and its legislative history point to the conclusion that Congress left untouched the power of the courts to consider—in a criminal prosecution—jurisdictional errors other than those dealing with the classification."[33]

(2) Perhaps Congress intended only to require exhaustion of those administrative remedies afforded within the Selective Service System before resorting to the courts. If the only purpose was to overrule *Wolff*, that is a quite plausible reading, for the plaintiffs in that case filed their suit before they had appealed through Selective Service channels. Moreover, some of the testimony before the congressional committees stressed the importance of requiring exhaustion in accordance with well settled principles of administrative law,[34] and both committee reports cited exhaustion of remedies as one concern of the amendment. The virtue of this approach, of course, is avoidance of the constitutional issue by permitting pre-induction review as broad as the review previously available in a prosecution for refusing induction.

This construction must, however, be dismissed as an idle hope. The congressional committees did speak of exhaustion, but those references were always followed—in the reports as well as in the statute—with an insistence that review must also await the registrant's affirmative or negative response to an order to report for induction. To read the amendment as requiring only exhaustion would give back what *Falbo* took away. Such a construction is hardly consistent with the temper of the Congress that adopted the provision or of the Selective Service administration that called for it. Finally, this view

32. *E.g.*, Witmer v. United States, 348 U.S. 375 (1955); Dickinson v. United States, 346 U.S. 389 (1954).
33. United States v. Lybrand, 279 F. Supp. 74, 77 (E.D.N.Y. 1967).
34. *See, e.g.*, JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 424-50 (1965) [hereinafter cited as JAFFE].

would attribute to the administrative appeal an unrealistic importance; requiring exhaustion, by itself, is of little value to the Selective Service if the courts can intervene as soon an an appeal has been denied (or has been foreclosed by unanimity at the intermediate level). This construction must, therefore, be rejected despite its obvious attraction. Timing, not exhaustion, is the heart of the matter.

(3) A close reading of the language of the amendment suggests another construction. There can be judicial review only after "the registrant has responded either affirmatively or negatively to an order to report for induction or for civilian work . . . ." Heretofore, under *Falbo* it has been assumed—save for the few injunction suits discussed above[35]—that the registrant actually had to appear at the induction center and refuse to take the critical "step forward"; only *this* refusal would set in motion a prosecution in which the validity of the classification could be challenged. Accordingly, it has been suggested that the amendment does alter the exhaustion requirement to this extent by "no longer requiring that a registrant report" for induction; that is, he may now reopen his classification in a prosecution for *failing to appear*.[36] The frequency with which registrants will be rejected at the induction center as a result of physical inspection or other reasons is persuasive evidence to the contrary, however.[37] Given the possibility of such rejection and the recent amendment's mandate that the registrant exhaust all his administrative remedies, this construction seems incompatible with the congressional design.

(4) Professor John Griffiths has proposed another construction of the amendment which seems more consonant with its origins. The statute, he notes, forecloses pre-induction review only of "classification or processing." "Surely it is plausible," he suggests, "to argue that an act wholly outside a board's jurisdiction cannot be described as an act of 'classification or processing' since these terms refer to the ordinary, authorized activities of draft boards."[38] There is some basis for this interpretation in the way the courts have handled review of NLRB certification orders, despite an apparent statutory preclusion. In this and other contexts, exceptions to a mandate against review have been found when the claim for review rests on an allegation that the agency has exceeded its jurisdiction.[39] The same reasoning might be applied here.

The argument to the contrary is forceful, however. Both the history and the language of the recent amendment suggest a much more restrictive congressional view than is apparent in the labor-certification context.[40] Furthermore, the interest in dispatch and certainty

35. *See* cases cited at notes 25-26 *supra*.
36. *See* Griffiths, Book Review, 77 YALE L.J. 827, 829-30 n.15 (1968).
37. The contrary argument is forcefully developed in Sable, The Meaning of the 1967 Amendment of Section 10(b)(3) of the Selective Service Act 22-24 (unpublished manuscript 1968).
38. Griffiths, *Some Notes on the Solicitor General's Memorandum in Oesterreich: Concerning Punitive Reclassifications and § 10(b)(3) of the Act*, 1 SSLR 4012, 4013 (1968).
39. *E.g.* Leedom v. Kyne, 358 U.S. 184 (1958). *See generally*, JAFFE, *supra* note 34, at 339-53.
40. In the labor-certification context, as in most others where an excep-

appears somewhat stronger here. And, finally, there is an important difference between the equitable interests of the two plaintiffs: In the labor context the party seeking review (for example, a union that lost an election) may be unable to challenge the administrative decision through any other channel at any time.[41] The alternative for the registrant who wants to reopen his classification is, of course, onerous and risky; a criminal prosecution carries consequences far graver than the prospect of losing an injunction suit. Nevertheless, not all channels are closed to the registrant as they often are in the other contexts where an exception to "unreviewability" has been implied by the courts.

(5) A more cautious view of the implied exception is that of the Solicitor General. In his brief in *Oestereich* he argued that an injunction suit might be permitted in a case where the action of the local board contravenes a clear statutory policy—for example, where a registrant is deprived of an exemption clearly conferred by Congress.[42] Since one exception must be read into section 10(b)(3) to permit review by habeas corpus,[43] the Solicitor General has suggested that another exception can be tolerated because of the need to resolve the conflict of statutes.

This exception may reflect sensible policy, but it makes dangerous law. The exception for habeas corpus has so clear a constitutional basis that it hardly need be declared in the statute, nor need there be any legislative history to support it. The exception for injunction suits under limited conditions must, however, stand on a quite different footing. If its rationale lies in the apparent conflict between the two statutes, then one would expect some indication in the legislative materials that Congress meant to qualify the later statute rather than the earlier one. An equally plausible reading would hold the policy of section 10(b)(3) to be so strong that the courts must not interfere before induction even when the draft board has disobeyed a clear statutory command. Moreover, the same kind of claim could be made

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tion of this sort has been implied, the statute has not expressly foreclosed or postponed judicial review, but has simply been silent on the question. The dissenters in Leedom v. Kyne, 358 U.S. 184 (1958), did point to some legislative history that suggested a preclusive intent, but this design never found its way into the terms of the statute. Thus the cases are really quite different in this respect.

41. Even this persuasive factor has not always sufficed to make reviewable actions for which review was not provided in the statute. *E.g.*, Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943).

42. *E.g.*, 50 U.S.C. APP. § 456(g) (1964).

43. As the Solicitor General's brief in *Oestereich* notes, the absence of provisions for habeas corpus in § 10(b)(3) cannot carry any significance beyond oversight, or assumption that such a reference was superfluous. Habeas corpus was clearly recognized under the prior law, Witmer v. United States, 348 U.S. 375, 377 (1955), and there is surely no evidence of any design to extinguish preexisting remedies.

in almost every colorable injunction suit against the Selective Service.

If, on the other hand, the basis for this exception is constitutional, then the argument proves too much. Whatever may be said about the constitutionality of postponing review (or barring all review) under these circumstances cannot be confined to the facts of the *Oestereich* case. The constitutional arguments marshalled in support of the exception will apply equally to most cases in which reclassification has been used to punish dissent or protest. Indeed, at one level, the constitutional argument reveals misgivings about the validity (on procedural due process grounds) of foreclosing review before induction, regardless of the substantive basis for the classification. But even in its narrower reading, the constitutional argument presented by the Solicitor General is necessarily so broad that it permits the exception to swallow much of the rule.

(6) At least one court has suggested an exception to the judicial review amendment in cases of "irreparable harm."[44] The phrase has a beguiling appeal but the logic of this dispensation is little firmer than the foundation of the Solicitor General's exception. The "harm" at issue in that case was no more "irreparable" than a great many cases where a registrant claims that a reclassification is beyond the local board's jurisdiction or violates his constitutional rights; if he cannot raise his claim by civil suit, then he faces a practical choice between three years in federal prison or a year in Vietnam. The real basis for the "irreparable harm" exception was, in fact, a passage from the Solicitor General's original memorandum in *Oestereich* which suffered the same limitations as the brief on the merits.

Rejection of this last possibility brings the inquiry full circle. None of the proposed exceptions (other than the undeniable recognition of habeas corpus after induction) finds a valid basis in the statute or its history. Congress clearly meant to do more than require a registrant to exhaust his remedies within the Selective Service before going to court; the prior law, with the possible exception of *Wolff*, requires at least that much.[45] Whether Congress might have wished to allow review in a prosecution for refusing to report for induction rather than refusing induction is a question of merely abstract interest. Even if there were practical value to it, the legislative context seems so clearly against even this limited exception that there is little basis for pressing the claim. One returns at length to the position that most of the courts have assumed: The statute means what its terms suggest—that a classification may not be challenged until after the registrant has reported for induction or for civilian work and has "responded affirmatively or negatively." If he reponds affirmatively, he may then file a habeas corpus petition as soon as he is officially

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44. Kimball v. Selective Service Local Bd. No. 15, 283 F. Supp. 606, 608 (S.D.N.Y. 1968).

45. It is difficult to read Falbo v. United States, 320 U.S. 549 (1944), as requiring any less—although it is true that several lower federal courts relaxed the *Falbo* standard during the years before and after the Korean War.

serving in the armed forces.

The Constitutional Dimension

The Issue Defined

The constitutional issue cannot be avoided. In order to frame that issue, however, a word or two must be said about what is not involved. Congress has not attempted to cut off all judicial review of Selective Service action. Were that the case, the answer would be fairly clear: Habeas corpus, at least, must survive by implication, and very likely there must be some other opportunity to question a classification—in a prosecution for refusing induction if no earlier occasion is provided.

Despite some superficial similarity, the issue here is not the one that surrounds a request for a declaratory judgment about one's status. It is true that the registrant wants a judicial opinion about his situation and the risks he may incur in the future. But unlike the resident alien longshoreman who wants to leave the country temporarily but fears he may not be allowed to reenter the country;[46] or the postal employee who wants to participate in political activity forbidden by the Hatch Act;[47] or the physician who wants to give proscribed birth control information,[48] the registrant who questions the constitutionality of his classification has already done the act or effected the change of status that places him in jeopardy. The decisions about what happens to him next, and how soon, are now out of his hands. He may, of course, still act in such a way as to avoid the next turn of the wheel on which he is caught—for example, by fleeing the country or by enlisting voluntarily in the armed forces. The vital difference, however, is that unless he takes such a step (or the draft call declines sharply) he may be called for service at any time pursuant to someone else's decision. Thus the discussion of the problem as one of "ripeness" may be misleading. Although the timing of review is, of course, the central issue here, there is not an issue of "ripeness" in the usual sense; the "ripening" of the plaintiff's claim does not depend, as in the typical case where "unripeness" impedes review, upon his own failure to take some necessary further step.

Nor, despite a beguiling symmetry, is the question of timing the same as the question considered in *Yakus v. United States*.[49] In that case the Supreme Court sustained the constitutionality of the judicial review provisions of the World War II Emergency Price Control Act.

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46. International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954).
47. United Public Workers v. Mitchell, 330 U.S. 75 (1947).
48. Poe v. Ullman, 367 U.S. 497 (1961).
49. 321 U.S. 414 (1944).

Under those provisions, objections to OPA price regulations could be raised through administrative hearings, with review in the Emergency Court of Appeals within sixty days after promulgation. Additional objections could be raised subsequently if they were based on grounds arising after expiration of the sixty days. A person or firm charged with violation of a regulation was, however, precluded from challenging its validity in a criminal prosecution. Relying in part upon the exercise of the special powers that a national emergency vests in Congress, the Court found no denial of due process in this unusual acceleration of judicial review. But that case is not this one, nor does it control here. If the registrant were given full administrative and judicial review of a classification before induction, the foreclosure of review in a subsequent prosecution for refusing induction might impose a difficult choice, but one far less onerous than that imposed by the reverse relationship that now obtains in the draft context. *Yakus* is therefore of little help in understanding or deciding the question now before us, even though there is a common concern with the timing of judicial review.

So much for what is *not* involved here. It is more difficult to identify what *is* at stake. There is no simple formula by which to determine when an avenue of judicial review should be implied to avoid a constitutional collision, or created because of one. The Supreme Court has said that "if the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress has created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."[50] Moreover, even where Congress has expressly declined to provide for review of administrative decisions, the courts have occasionally found a constitutional basis for appeal or injunction suits.[51] "Judicial review," observes Professor Jaffe, "is the rule. It rests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest."[52]

The issue now before us, then, is unique and difficult in two respects: first, because this is a rare instance in which Congress has in fact made "specifically manifest" its intent that review not be available through a particular channel; and second, because the issue here is not whether to create one channel where Congress has provided none, but whether to recognize two where Congress has provided one, on the ground that the one is constitutionally deficient. There are no cases precisely on the point, and reasoning therefore must proceed by analogy.

The Statute's Effect: The Relevance of Dombrowski v. Pfister

The analysis of this constitutional issue leads inevitably back to *Dom-*

50. Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300 (1943).
51. *E.g.*, School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).
52. JAFFE, *supra* note 34, at 346.

browski v. Pfister,[53] where the Supreme Court allowed a district court injunction against enforcement of the Louisiana Subversive Activities Law.[54] The plaintiffs alleged they were being harassed by threatened enforcement of the law, and that it was patently unconstitutional. They argued that the very threats to enforce the law abridged their freedom of expression. The evidence satisfied the Court of "the chilling effect on free expression of prosecutions initiated and threatened in this case."[55] Moreover, the absence of any assurance that the plaintiffs' constitutional claims could be raised in state courts made the federal forum an essential avenue for the vindication of their constitutional interests.

Much discussion about the constitutionality of section 10(b)(3) has assumed that *Dombrowski* is dispositive. In fact, it is relevant but not controlling. The induction case is somewhat easier than *Dombrowski* in one sense but harder in another. It is easier because the action is a registrant's request to the court to enjoin an administrative decision of a federal agency (over which federal judicial control is plenary), rather than a state criminal prosecution, as was involved in *Dombrowski*.[56] But the Selective Service case is harder in another respect, suggested by language quoted above: The Supreme Court was obviously troubled in *Dombrowski*—perhaps vitally influenced—by a conviction that judicial review of the plaintiffs' constitutional claims would be unavailable, or at least inadequate, in the state courts. Noting that prosecution had been threatened under sections of the Subversive Activities Law other than those on which indictments had already been brought, Mr. Justice Brennan observed for the Court:

> Since there is no immediate prospect of a final adjudication as to those other sections—if, indeed, there is any certainty that prosecution of the pending indictments will resolve all constitutional issues presented—a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues.[57]

At first glance the position of the draft registrant appears materially better than that of the Louisiana civil rights lawyer, for the Selective Service law guarantees eventual review, and the review is in the federal courts. But below the surface there are disturbing parallels between *Dombrowski* and the draft cases: First, the scope of review of draft classifications (by decision prior to the 1967 amendment, and now by statute) is much narrower than in most administrative proceedings—even those where the liberty of the respondent

53. 380 U.S. 479 (1965).
54. LA. REV. STAT. §§ 14:358-74 (Cum. Supp. 1962).
55. 380 U.S. at 487.
56. *See* 28 U.S.C. § 2283 (1964); Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961).
57. 380 U.S. at 489.

is not at stake.[58] Although some aspects of the classification process can be reopened under the "no basis in fact" standard, others are permanently insulated. While there is a good deal of case law following *Estep* which defines that phrase,[59] it is unclear whether the new statute has carried over the amplification of the test or only the phrase itself.[60] Thus the extent to which a registrant may reopen a classification may, in practice, depend upon the particular court to which he goes—a matter over which he has little if any choice.

Second, access to judicial review is really no better guaranteed to the Selective Service registrant than it was to the plaintiffs in *Dombrowski.* Not every registrant who is reclassified will, of course, be called for induction. Nor does he have any control over the timing of the call. Even more serious is the lack of certainty that a failure to appear or a refusal of induction will result in prosecution. The legislative hearings are replete with complaints by Selective Service officials themselves about draft cases that the Justice Department would not prosecute.[61] General Hershey told the Senate committee that "we are caught many times with the U.S. Attorney not agreeing with the classification which was given by the local board" and accordingly refusing to prosecute, even after prodding from Selective Service.[62]

This is not to say, of course, that the Justice Department should press a case in which the draft board has manifestly erred, but it does suggest the anomaly caused by the mounting tension between these two branches of the Government: If the classification is clearly or probably valid, the registrant can be fairly sure of a court test by refusing induction. But if the draft board has clearly exceeded its constitutional or statutory power and has not been reversed by Selective Service appeal, then the registrant may have to face the continuing uncertainty created by the U.S. Attorney's inaction after he violates the law.[63] His case for injunctive relief is not helped by the limbo in which such inaction places him, and there is no way he can compel the Justice Department to close the case it declines to press. If he is near age 26, he may be fairly safe, although even immunity from the draft may be of little comfort if the statute of limitations on

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58. For general discussion of the scope of review of administrative decisions, see JAFFE, *supra* note 34, at 546-618.

59. *E.g.*, Witmer v. United States, 348 U.S. 375 (1955); Dickinson v. United States, 346 U.S. 389 (1954).

60. The one court that has squarely considered this issue concluded, quite plausibly, that Congress meant through § 10(b)(3) to codify the case law that had developed since *Estep.* United States v. Lybrand, 279 F. Supp. 74, 77 (E.D.N.Y. 1967).

61. *Hearings on Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services,* 90th Cong., 1st Sess. 2520-26 (1967).

62. *Hearings on S. 1432 Before the Senate Comm. on Armed Services,* 90th Cong., 1st Sess. 620 (1967).

63. The 1967 amendments may have narrowed the range of uncertainty a bit. Section 12(c), 50 U.S.C. APP. § 462(c) (Supp. III, 1965-67), requires the Justice Department to report to Congress when it declines to prosecute such a case after a request from Selective Service. But the reporting requirement is, of course, no guarantee that the case will be resolved either way.

the criminal violation is still running.

A third important ingredient of the analogy is the most obvious and most serious—the extraordinarily high price the registrant must pay to obtain judicial review. Even if refusal to report or to step forward were certain to bring about a test of the classification, the present law imposes a harsh choice. It is frequently true that one may have to violate a law in order to find out whether it covers him. The consequences of a bad guess are, however, usually less drastic than they are under the Selective Service Act, which makes a violation a felony, and for which increasingly heavy penalties are being imposed.[64] As the Government's brief in *Oestereich* concedes, the registrant "does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty."[65]

The choice may seem less cruel if one accepts the Solicitor General's view of the registrant's options: "The only effect of Section 10(b)(3) . . . is to require the registrant to choose between the risk of imprisonment and the risk of a short period of military service before judicial review can be obtained; a pre-induction suit would permit him to defer this choice until the review proceedings had been completed."[66] If nothing more than time for reflection and decision could be gained by early review of a doubtful classification, then the interest at stake on the registrant's side would appear slight. The Solicitor General would then be correct in questioning whether "the Constitution requires that he be given that opportunity." But the practical interest of the registrant in gaining a court test of his classification before being ordered to report for induction is really far more substantial.

A registrant may in fact be able to change his status so as to defer the military obligation or avoid it altogether if a court sustains the challenged classification. There is, of course, the extreme option of renouncing one's citizenship permanently or fleeing the country temporarily. More plausible are the choices that the law clearly permits: One who is denied a conscientious objector exemption may enroll in divinity school. A registrant who loses a deferment as a college instructor may take a relatively high priority teaching position in an inner-city school. Or he may even enlist for European duty in one branch of the service to avoid an almost certain assignment to

64. N.Y. Times, Mar. 3, 1968, at 76, cols. 3-6, reports that average sentences for refusing induction have risen from 21 months in 1965, to 26.4 months in 1966, to 32.1 months in 1967.
65. Brief for Respondents at 61, Oestereich v. Selective Service Local Bd. No. 11, No. 46 (U.S. 1968).
66. *Id.* at 25.

Vietnam that would follow induction into another branch. Probably the registrant who appeals unsuccessfully through the administrative channels would be well advised to seek some such alternative anyway. But the value of a *judicial* determination far exceeds the worth of an answer from the upper echelons of the very agency that imposed the challenged classification initially. For the average registrant, judicial review clearly is most meaningful at the pre-induction stage, and for some, review at any other time may be virtually meaningless.

Apart from the wide range of options that may be lost by postponement of judicial review, the registrant's position may be jeopardized in a quite different way. Consider *Oestereich*, the case in which a draft exemption has been revoked for anti-war protest. When Oestereich sought to challenge his classification before induction, he was told he was raising the issue prematurely. Yet if he were to report for induction, he might be held to have waived the very exemption he asks to have restored.[67] Even the Government's brief recognizes that an exemption might be held to have been waived by accepting induction in order to raise the issue by way of habeas corpus. It is unclear whether merely reporting and then refusing induction could constitute waiver. Nevertheless, the severity of the dilemma is clear, and further undermines the effectivness of review that is long postponed.

The analogy to *Dombrowski* is particularly strong in cases where (as in *Wolff* and *Oestereich*) reclassification results from an act of protest or political expression. A number of registrants sent letters to their local boards expressing complicity with Dr. Benjamin Spock and his co-defendants after their indictment for counseling draft evasion late in 1967. Several of these letters triggered notices of reclassification for "counselling evasion of the Selective Service Law."[68] If it is generally known that such reclassification may follow an act of pure speech in protest against the Vietnam War or a draft board sit-in, then free expression and political activity are chilled in much the same way as they were jeopardized in *Dombrowski* by threatened enforcement of the Louisiana Subversive Activities Law. While a constitutional lawyer may know that such activities are protected by the first amendment and would never support a reclassification, the average registrant is presumably less sophisticated. And where the status of the activity is less clear—for example, peaceful picketing that discourages volunteers from enlisting—even the lawyer may be uncertain what to expect from a district court. The temper of the times

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67. *See* Petersen v. Clark, 285 F. Supp. 700, 712 (N.D. Cal. 1968) ("[S]ubmitting to induction is the equivalent of compliance with the administrative order alleged to be invalid").

68. There are at least four such cases acknowledged by the Solicitor General in his *Oestereich* brief, *supra* note 63, at 44 n.18. Three of the cases are reported to have been reversed administratively. The fourth case involved a graduate student at the State University of New York at Buffalo, holder of a III-A classification because of his family status, who received a I-A delinquency notice for "counseling evasion of the Selective Service Law"—an obvious reference to his letter of complicity sent to the draft board after the Spock indictment.

and the strength of emotions on both sides of the Vietnam issue only heighten the dilemma.

There is an additional factor, unique to the draft context, that gives special force to the *Dombrowski* analysis. The Justice Department and the Selective Service System are at complete odds on the validity of using reclassification to punish registrants for protest activities. General Hershey took the position at the time of the Ann Arbor sit-in that a registrant who violated any provision of the Selective Service law should be reclassified, and probably as a delinquent (making him immediately liable for induction). The Justice Department promptly disagreed. An Assistant Attorney General argued publicly that reclassification should not be used "to stifle constitutionally protected expression of views."[69]

When the issue was revived in the fall of 1967, the conflict between the agencies was even sharper. Although a paper entente between Attorney General Clark and General Hershey appeared to patch the rift momentarily,[70] the feud was soon back in the open. From the White House, a lawyer-presidential assistant assured the presidents of the Ivy League colleges that "the draft is not to be used as a punishment and . . . draft boards are not to become extra-legal judges of the legality of acts of protest."[71] But the assurance came too late. General Hershey meanwhile had told the Attorney General, "You go your way, and I'll go mine."[72] He continued to insist that registrants who interfered with recruiting or induction were subject to reclassification as delinquents, whether or not their acts of protest affected their individual status as registrants.[73]

The continuing detente between General Hershey and the Justice Department is bound to discourage many protest activities of already wary registrants. Their position is, as Professor Thomas I. Emerson noted recently, "a precarious one [since General Hershey] has not withdrawn from his position, and while his view is not binding on local draft boards, it is obviously persuasive if not compelling."[74] Realistically, that view of the memorandum is unavoidable. Yet when the National Student Association sued to enjoin the Hershey directive, they were told that it "had no legal effect whatever," but was

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69. Letter from Assistant Attorney General Fred M. Vinson, Jr. to Prof. Herman Schwartz, Jan. 6, 1966.
70. Joint Statement of Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey, Dec. 9, 1967. N.Y. Times, Dec. 10, 1967, at 1, col. 4; at 13, col. 1.
71. Letter from Joseph A. Califano, Jr., Special Assistant to the President, to Kingman Brewster, Jr., president of Yale University, Dec. 26, 1967. The letter added, "General Hershey has informed me that he adheres to these views."
72. Philadelphia Bulletin, Dec. 12, 1967, at 2, col. 1.
73. N.Y. Times, Dec. 21, 1967, at 10, col. 3.
74. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 1009 (1968).

"merely [the general's] personal opinion" which the court had no jurisdiction to set aside.[75] Almost gratuitously, the court added that "there is an adequate remedy for anyone whose rights are abused in the event they are reclassified by exercising a constitutional right administratively and through the Federal Courts to protect that interest."[76] The deliberate insulation of the obviously influential Hershey directive thus strengthens the analogy to *Dombrowski.*

The Constitutional Arguments

As the Justice Department's opposition to it suggests, there are grave doubts, both statutory and constitutional, about using reclassification for punitive purposes. The statutory objection is rather simply stated. In the words of White House assistant Joseph Califano: "[T]he Selective Service system is not an instrument to repress and punish unpopular views. Nor does it vest in draft boards the judicial role of determining the legality of individual conduct . . . . Where violations occur, the judicial system must be invoked." Professor John Griffiths, after reviewing the statute carefully, concluded, "there is not a single word in the Act which so much as suggests the local boards are to act as courts, imposing induction as a summary punishment for the breach of duties under selective service law."[77]

The constitutional argument is much more elaborate, and cannot be fully developed here. By any of three routes it reaches the conclusion that an administrative proceeding which leads to reclassification and induction is so clearly deficient in procedural safeguards that it cannot support the grave consequence that follows. One route examines the outcome of the proceeding, and characterizes it as penal in substance even though civil in form. By analogy to the Supreme Court decision in *Kennedy v. Mendoza-Martinez*[78] (involving loss of nationality), there seems little doubt that reclassification and induction do constitute a penalty, and must therefore be accompanied by various procedural safeguards that are in fact absent from draft board proceedings.[79] Draft boards may actually be less scrupulous of the rights of registrants than are many federal regulatory agencies toward

75. National Student Ass'n v. Hershey, Civil No. 3078-67 (D.D.C. Mar. 8, 1968), *summarized in* 1 SSLR 3026 (1968).
76. *Id.*
77. Griffiths, *supra* note 38, at 4009.
78. 372 U.S. 144 (1963).
79. Selective Service regulations forbid, for example, representation of a registrant by counsel—a restriction almost unique in administrative procedure. This provision has been sustained against constitutional challenge, United States v. Sturgis, 342 F.2d 328 (3d Cir.), *cert. denied,* 382 U.S. 879 (1965), on the ground that draft board proceedings are "non-judicial in nature and clearly non-criminal." Courts have begun to question the propriety of summary draft board proceedings, however. Recently a federal district judge in Boston set aside a prosecution against a registrant whose draft board had not allowed him to be present at the meeting at which his case was considered. N.Y. Times, Dec. 10, 1967, at 7, cols. 1-6. Draft board proceedings may be deficient in numerous other respects as well—failure to provide for confrontation and cross-examination, and to protect against self-incrimination; misallocation of the burden of proof, etc. *See generally* Griffiths, *supra* note 38, at 4005-07.

the interests of businesses they regulate.

The same result follows as clearly by an alternative route. Where reclassification is used to punish protest—that is, to judge the legality of certain forms of expression—the draft board performs a function as sensitive and delicate as that of a censorship board. The Supreme Court has repeatedly withheld from administrative agencies the power to preclude the showing of a movie or to halt the sale of books and magazines without the most scrupulous observance of procedural safeguards—including assumption of the burden of proof by the censor and a guarantee of very prompt judicial review.[80] The procedural requisites would seem at least as strict where a registrant may lose his deferment or exemption because of activity arguably protected by the first amendment. Moreover, since all the acts for which punitive reclassification has been imposed are also violations of the Selective Service Act, and therefore punishable criminally, the Government has an obligation to use the judicial rather than the administrative machinery. Only a court affords the guarantees that are constitutionally prerequisite to deprivation of liberty.

The first approach requires a showing that reclassification and induction constitute a "penal" sanction. The second approach depends upon some infringement of first amendment rights. A third approach has much broader implications. The Government brief in *Oestereich* stresses that "service in the Armed Forces has traditionally been considered a privilege . . . and not a criminal punishment."[81] Thus, the argument runs, a reclassification is merely the withdrawal of a benefit and not the imposition of a penalty. For one who enjoys an exemption, the benefit might be permanent; one who is merely deferred benefits only temporarily. Since the procedural safeguards lacking in draft board proceedings are required only when a burden or penalty is imposed, and not when a benefit is taken away, no attack can be mounted on due process grounds against punitive reclassification.

An argument along these lines would have had considerable force not too many years ago. Recently, however, the doctrine of unconstitutional conditions has been refined to a point that so crude a distinction between "penalties" and "benefits" simply will not stand. It is true that not every withdrawal of a benefit or privilege need be accompanied by the full panoply of procedural safeguards; no one would argue, for instance, that a jury has to decide whether a postal employee's Christmas bonus can be withheld for an infraction of

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80. Freedman v. Maryland, 380 U.S. 51 (1965); *cf.* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

81. Brief for Respondents at 49-50, Oestereich v. Selective Service Local Bd. No. 11, No. 46 (U.S. 1968).

agency rules. But where the benefit is substantial—and it is hard to think of one that is more substantial today than a draft deferment or exemption—a summary or truncated proceeding cannot be justified simply by calling that benefit a "privilege" rather than a "right."

In the case most closely on point,[82] the Supreme Court held that South Carolina could not deny unemployment compensation to a woman simply because her religion made her unavailable for Saturday employment. To condition eligibility for benefits on her willingness to compromise her religious scruples and work on the Sabbath would violate her first amendment religious liberty. The Court stressed the irrelevance of characterizing the South Carolina benefits as "privilege" rather than "right," although recognizing that the state had no constitutional duty to provide such payments to any citizen.[83] So long as the state did undertake such a program, the Court warned, it could no more curtail first amendment rights by denying or conditioning benefits under it than by imposing direct sanctions.[84]

A similar argument applies to punitive reclassification. A draft deferment or exempton may be only a benefit or privilege, and not a right. Equally, the withdrawal of a deferment or exemption may not be a "penalty" in the classic sense (although we have argued above that it should be so treated). But these characterizations are no longer dispositive of constitutional claims. Rights of free expression cannot be penalized by withdrawing so important a benefit where imposition of a direct penalty would be unconstitutional. Even though a full criminal trial may not be appropriate, scrutiny of the procedures used to withdraw or curtail the enjoyment of such a benefit is surely warranted. The importance to the registrant of the deferment or exemption, combined with the direct impact of punitive reclassification, make the procedures typically used by local draft boards highly suspect.

The combined effect of these arguments is to cast grave doubt upon the constitutionality of section 10(b)(3). Nevertheless, only a very persuasive case against the statute will warrant setting it aside on constitutional grounds. Whatever may be the infirmities of an act of Congress stripping the district courts of all jurisdiction of a particular question or insulating particular agency decisions from all judicial review, the case is quite different when the statute merely postpones review until the case has "ripened" to a point deemed appropriate for judicial intervention.

Postscript[85]

The Supreme Court has now addressed itself to many of these questions. The decision of two companion cases—one by full opinion after

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82. Sherbert v. Verner, 374 U.S. 398 (1963).
83. *Id.* at 404-05.
84. *Id.* at 406.
85. The major portion of this article was prepared and set in type before (though in anticipation of) the Supreme Court decisions in the *Oestereich* and

briefing and argument, the other summarily on the papers—has given some guidance in the resolution of the quandaries of reclassification and review. But the Court's action has raised some new doubts, and upset some expectations, in the process of deciding the issues immediately before it. This addendum seeks to fit these two cases into the context of the foregoing discussion.

The principal case was *Oestereich*,[86] the case of the divinity student who brought suit for reinstatement of his IV-D exemption that was withdrawn because he turned in his draft card. Speaking through Mr. Justice Douglas, the Court accepted the Solicitor General's invitation to resolve the statutory conflict in the registrant's favor, but upon a quite narrow ground. Although section 10(b)(3) purported to cut off all pre-induction review, at least one exception must be recognized for the remedy of habeas corpus that could not be legislatively extinguished. A similar exception could be implied in favor of a divinity student, in part because the basis of the IV-D exemption was so "plain and unequivocal" in the statute and was "in no way contested here," and in part because the Court had serious doubts about the proprietory of the delinquency reclassification procedure the draft board had employed to cancel Oestereich's exemption. Mr. Justice Harlan concurred,[87] adding in a separate opinion his conviction that such an exception was not inconsistent with the rationale of Congress in enacting the preclusive provisions of section 10(b)(3).

Mr. Justice Stewart was joined in dissent by Justices Brennan and White.[88] In their view, the majority had overriden on rather flimsy grounds an unambiguous exception to district court jurisdiction—an exception that was within the power of Congress to create, absent any constitutional restriction not cited by the majority. To the dissenters the legislative history and the policies behind the 1967 amendment left no doubt that Congress meant to foreclose precisely the kind of case that had brought the issue before the Court. That the statute might survive "unimpaired" in other contexts, as Justice Douglas has suggested, was a gratuitous observation to the dissenters in view of the vital blow they felt *Oestereich* had dealt to the legislative scheme.

The companion case involved a registrant who had been denied a conscientious objector exemption by his local board and had brought

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Gabriel cases. Since revisions in the main text have not been possible at this late date, comment upon the effect of these two decisions has been relegated to this postscript. The substance of the foregoing discussion does not, however, appear to have been materially altered by this intervening development.

86. Oestereich v. Selective Service Local Bd. No. 11, 37 U.S.L.W. 4053 (U.S. Dec. 16, 1968).

87. *Id.* at 4055.

88. *Id.* at 4057.

suit to enjoin his induction after being classified I-A. The district court had granted a preliminary injunction pending a review of the merits, and the Government appealed directly to the Supreme Court. Distinguishing *Oestereich* in a brief per curiam opinion, *Clark v. Gabriel*[89] found in the statute a clear mandate that draft board decisions on *CO* claims could be reviewed only through the channels prescribed by section 10(b)(3). No constitutional rights of the registrant would be infringed by postponing judicial review until after induction.[90] Moreover, the very statute that provided for exemption on grounds of conscience conditioned that exemption upon the claim being "sustained by the local board."[91] Finally, looking to the policies of section 10(b)(3), pre-induction review would "permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' . . . which Congress sought to prevent . . ."[92] by enacting this preclusive amendment.

These two cases, taken together, do resolve some easy residual questions that are close to one end of the spectrum or the other. Clearly covered by *Gabriel*, for example, are claims to exemptions or deferments that require a factual determination by the draft board of the particular registrant's status—at least where the controversy relates to eligibility for the dispensationn itself. The classic illustration—which few would have thought reviewable even before *Gabriel*—would be a contest over physical fitness and the board's denial of a IV-F.[93] There are other bases for deferral of or excuse from military service that involve at least as close and individualized a factual determination as the *CO* claim in *Gabriel*. In these cases, there can be little doubt that Congress meant what it appeared to say in section 10(b)(3), and that nothing in the Constitution or in other legislation prevents the courts from giving force to that intent.

At the other end of the scale, cases of several types seem with equal clarity to be appropriate for pre-induction review under *Oestereich*. Where a deferment or exemption is given in specific and explicit terms by the Selective Service Act, but is withdrawn by a draft board for conduct unrelated to the basis for the dispensation, there seems little doubt that the courts may intervene before induction. If, for example, a reserve officer, or a 45 year old man, or a sole surviving son, is reclassified I-A and called up for service, the district

89. 37 U.S.L.W. 3217 (U.S. Dec. 16, 1968).

90. The Court assumed, at least, that no constitutional issues were implicated by the procedure for denying a conscientious objector claim. That assumption is consistent with the Court's earlier decision in United States v. Seeger, 380 U.S. 165 (1965), which avoided the constitutional issue lurking behind the statutory exemption for conscientious objectors by construing the statute broadly enough to include the claims before it. Curiously, no mention was made of *Seeger* in *Gabriel*. Perhaps this is because of the rather implausible nature of the particular exemption claim, as revealed in the summary of the disputed testimony set forth in an appendix to the concurring opinion of Mr. Justice Douglas.

91. 50 U.S.C. APP. § 456(j) (Supp. III, 1965-67).

92. 37 U.S.L.W. at 3217.

93. *Cf.* Costas Elena v. President of the United States, 288 F. Supp. 388 (D.P.R. 1968).

courts would seem empowered to enjoin the reclassification. Despite the language of section 10(b)(3), neither its policies nor the Supreme Court's view of its reach closes district court doors to such registrants as these.

Clearly there is much ground between these poles. Most of the sensitive and difficult cases bred by the Vietnam War lie in the zone left gray by these recent decisions. Several cases which may soon come before the Court on certiorari or appeal invite the refinement of the *Oestereich-Gabriel* doctrine.[94] The volume of litigation in the lower courts within the past year that turns upon questions not resolved by the Court attests to the continuing importance of this area of inquiry. District courts must glean whatever help they can from *Oestereich* and *Gabriel* but continue to interpret and apply section 10(b)(3) to a myriad of new and infinitely varied problems.

Several prototype cases will suggest the range of unresolved issues. Case A involves a registrant who held a II-S deferment during his first two years as a college undergraduate. During the third year he receives a traveling fellowship from a national foundation, and spends the year doing field research throughout the United States. The local board decides he is no longer eligible for his deferment, and reclassifies him I-A. He sues to enjoin his induction and get back his deferment. Case B also involves a full-time undergraduate student. He turns in his draft card to his local board and soon receives a I-A notice, having been declared delinquent because of his nonpossession of the registration certificate. Case C involves a third college student who is reclassified I-A delinquent because of his participation in a campus demonstration against a military recruiter, contrary to General Hershey's directive of November 1967. Finally, Case D is that of a college student, deferred in II-S, who receives a I-A delinquency notice because he urged other persons to turn in their draft cards but has not done so himself. (Although much broader range might have been achieved in the ensuing discussion by changing the basis of the deferment, it seemed wiser to hold at least one ingredient constant. Of all the variables, the basis of the exemption or deferment seems the one most readily resolved by reference to *Gabriel* and *Oestereich*.)

Case A (that of the student who is reclassified because the board decides he is no longer a full-time undergraduate) seems fairly close to *Gabriel*. Although the granting or withholding of a student deferment does not usually involve the exercise of the local board's discretion, this case shows that factual determinations of individual claims may sometimes be required. When the contest is over the

94. *See, e.g.*, Faulkner v. Clifford, 289 F. Supp. 895 (E.D.N.Y. 1968).

facts of the particular case, and when the disputed inferences about the facts relate centrally to the basis for the deferment or exemption, pre-induction review seems unavailable—however harsh and inequitable that result may be to the registrant who changed his status in good faith or innocence. Unless it be said that pre-induction review is always required, regardless of the basis for the exemption or deferment, there seems to be no constitutional obstacle here. For even the strictest application of the doctrine of unconstitutional conditions does not demand judicial review before withdrawal of a benefit which the Government was not constitutionally compelled to confer.

Case B moves much closer to the center of the scale. The basis for the dispensation—student status—is the same here as in Case A. There is no constitutional right to be relieved of military service while or because one attends college; Congress could remove the student deferment from the statute tomorrow. But there the analogy stops. Several important factors suggest that this case is really much closer to *Oestereich* than to *Gabriel*, and that pre-induction review should be allowed.

First, and perhaps most important, the conduct that triggered the reclassification was unrelated to the basis for the deferment. One who surrenders his draft card in protest against the war is still a student. Thus, as in *Oestereich*, the factual basis for the deferment "is . . . in no way contested here."[95] Second, whatever factual determination must be made—and there is not likely to be any contest over whether the registrant sent back his card, on what day and to what agency, etc.—can be undertaken as easily by the court as by the draft board.[96] There is no special expertise involved that would warrant a finding of delegation of exclusive pre-induction review to the Selective Service channels. Third, and closely related, reviewing the reclassification is not likely to impede significantly the mobilization of needed military manpower. The number of affected cases will be quite small. Once the basic questions are resolved, other cases will fall readily into line. Thus the policies behind section 10(b)(3) are not frustrated or jeopardized by allowing pre-induction court review in such a case.

Two other facets of Case B require further discussion, and bear significantly on Cases C and D. Clearly the case for judicial review prior to induction or prosecution is far stronger where the registrant's constitutional liberties are directly affected. Reliance upon *Dombrowski v. Pfister*[97]—curiously uncited in any of the several opinions

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95. 37 U.S.L.W. at 4054.

96. In his concurring opinion in *Oestereich* Mr. Justice Harlan reached essentially this conclusion by a different route. The preclusive operation of § 10(b)(3) was limited to "classification or processing of any registrant by local boards." This phrase, he suggested, applied to "the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction." On the other hand, the key phrase did not "prohibit review of a claim, such as that made here . . . , that the very statutes or regulations which the board administers are facially invalid." 37 U.S.L.W. at 4055.

97. 380 U.S. 479 (1965).

in *Oestereich* or *Gabriel*—supports such a suit where first amendment liberties are jeopardized by administrative action. Arguably, however, this case presents no substantial first amendment claim because of the Supreme Court's decision last spring in *United States v. O'Brien*.[98] That case involved a prosecution of a registrant for nonpossession and destruction of a registration certificate he had burned in protest against the Vietnam War. A majority of the Court concluded that the Government's interest in requiring a registrant to have his card intact at all times outweighed whatever first amendment claim he may have had to employ this particular form of political expression. On the basis of *O'Brien*, the dissenters in *Oestereich* argued that "no bona fide First Amendment issue" was presented; a registrant's "alleged return of his registration certificate to the Government would not be protected expression."[99]

The constitutional underpinning of Case B is not so clearly removed by *O'Brien*, however. That case decided only the constitutional issues presented by the ban against *destruction* of draft cards; affirmance on that ground made it unnecessary, the Court noted explicitly, to consider the validity of the *nonpossession* count. Moreover, the contexts are different. *O'Brien* involved direct prosecution for an offense against the Selective Service System. Case B, by contrast, involves an indirect form of punishment—the withdrawal of a benefit of considerable value to the recipient. And the grounds for the withdrawal, however material they may be to the administration of the Selective Service, are quite unrelated to the basis for the deferment. The Government's interest in prosecuting the registrant for burning (or not carrying) his card may be quite substantial when weighed against the registrant's interest in protesting through a particular medium. Particularly so long as the direct sanction is available, the Government's interest in taking away a student deferment when no change in the registrant's student status has occurred seems far less clear. The applicability of *O'Brien* to the constitutional issues raised by Case B thus seems doubtful on two distinct grounds.

There is one other facet to the case that merits discussion. The mechanism by which the student deferment is withdrawn for conduct unrelated to the basis for the deferment is, of course, the delinquency reclassification device. This procedure rests upon Selective Service regulations that appear never to have been squarely challenged in court. In his opinion for the Court in *Oestereich*, however, Mr. Justice Douglas cast a very long shadow over this mechanism without going quite so far as to declare it unconstitutional.

98. 391 U.S. 367 (1968).
99. 37 U.S.L.W. at 4058 n.11.

Weighing importantly in favor of pre-induction review was the absence of any legislative standards governing the delinquency reclassification procedure. The Court concluded that the "scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards . . . ."[100] Even where the statutory basis of the exemption or deferment is less explicit the same reasoning should apply. In short, the *Oestereich* decision leaves very grave doubt about the constitutionality of delinquency reclassifications—for reasons that are basic to administrative law and delegation of legislative power. Particularly where first amendment rights are at stake, the scope of delegation should be jealously reviewed and circumscribed by the courts if Congress has not provided the requisite standards.[101]

In his concurrence Justice Harlan made the same point in a slightly different way. *Oestereich*, he suggested, was really a challenge to the very procedure—the statutory framework—under which the draft board had withdrawn the deferment. Since that was the central issue, rather than a factual inquiry into an individual's status (such as *Gabriel* involved), the competence of the courts was clear and that of the boards doubtful. "Adjudication of the constitutionality of congressional enactments," observed Justice Harlan, "has generally been thought beyond the jurisdiction of administrative agencies."[102] Indeed, he added, the absence of procedural safeguards in draft board proceedings—such as the almost unique denial of counsel —has been sustained "on the ground that the proceedings are nonjudicial."[103]

The force of this last argument will depend, of course, on the registrant's aiming his suit at the delinquency procedure and the legislative authority invoked by the Selective Service. But after the broad hint given in *Oestereich*, what draft lawyer will not, in such a case, mount a major constitutional attack upon the delinquency reclassification device as well as upon the particular classification? And if the majority opinion is broadly construed, the Court has already all but held the delinquency procedure unconstitutional, deferring for the *coup de grace* to the district court to which the case was remanded.

If so strong a case can be made for review of Case B, then Cases C and D would appear a fortiori reviewable. The catalytic conduct of the registrant in each case is wholly unrelated to the basis for his deferment. As in Case B, the Government has a direct sanction—criminal prosecution—by which to vindicate whatever interest it may have in punishing or deterring that conduct. (In Case C, the conduct may be punishable, although only a criminal trial—with the full range of attendant safeguards that are denied in a draft board hearing—could make that determination. It seems unlikely that the con-

100. *Id.* at 4055.
101. *See* Griffiths, *supra* note 38, at 4005-07.
102. 37 U.S.L.W. at 4056 (footnote omitted).
103. *Id.*

duct in Case D—counseling others to violate the draft law—would be punishable at all if a substantial first amendment defense was made.) In Cases C and D, as in B, there is no contest about the basis for the exemption as such; the student is still a student, whatever else he may have done. And in all three cases the particular conduct works a forfeiture of the student deferment only by resort to the now dubious delinquency reclassification procedure. Finally it seems unlikely that keeping the doors of the district courts open to such cases would seriously disrupt or impede the mustering of troops essential to the national interest. There is, in short, no logical basis for treating any of these cases (B, C and D) differently from *Oestereich* itself.

This analysis suggests the *Oestereich* dissenters were right in their assessment of the reach of the decision. Whatever the majority may have said about preserving "unimpaired" the "normal operations" of section 10(b)(3), the exception has gone far toward swallowing up the rule. There may still be a few difficult cases, and many run-of-the-mill suits, which (like *Gabriel*) involve factual determinations that are (a) clearly within the draft board's competence; and (b) central to the exemption or deferment that is being contested. But the bulk of the Vietnam War cases seem to fall on the other side of the line within the logic of *Oestereich* if not its words. These cases are appropriate for review because they include all or most of the critical factors found in the hypothetical cases B, C and D analyzed above. Whatever may have been the design of Congress in enacting section 10(b)(3), the Court has avoided or postponed the difficult constitutional issues by according that statute a somewhat narrower reach than its language might warrant.

There is a particular irony to what has happened since 1965. We began with the *Wolff* case, involving the Michigan students reclassified because they took part in a draft board sit-in. This was the case that Congress presumably meant to overrule by enacting section 10(b)(3). Yet this now seems among the clearest of the cases in which pre-induction review is preserved by *Oestereich*, unless that decision is confined almost literally to its own facts. It is clear that Congress has not succeeded in doing what it presumably set out to do by amending the Selective Service Act. Any attempt to plug the gap would undoubtedly revive the constitutional issue that, for the moment, has been neatly circumvented.